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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

VINCENT SCHWENOHA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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Petitioner, Vincent Schwenoha, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled cause on October 26, 1967.

CITATIONS TO OPINION BELOW

The petition for rehearing before the United States Court of Appeals was denied, as set forth in Appendix A.

The opinion of the Court of Appeals, Second Circuit, of September 28, 1967 is set forth verbatim in Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Rule 22(2) Rules of the Supreme Court and Rule 37(c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Did the statute of limitations bar prosecution on all counts? The trial court failed to give instructions to the jury as to the defense of the statute of

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QUESTIONS PRESENTED

1. Did the statute of limitations bar prosecution on all counts? The trial court failed to give instructions to the jury as to the defense of the statute of

limitations. This implied a rejection by the court of so important a defense for the consideration by the jury when the petitioner presented cogent evidence that he had been completely disconnected with any member of Belmont Oil Corporation in March 1959, more than five years prior to the indictment which was filed July 14, 1964.

2. Whether a sale of the petitioner's personal stock which was of the original issue of the Belmont Divide and Mining Company (later changed name to Belmont Oil Corporation) which stock was issued in 1919 long prior to the Securities Act of 1933, Section 3, had been exempt from registration by law?

3. May a personal transaction of the personal stock of the petitioner, said stock being the original issue of stock, issued in 1919 by its issuer, be declared

criminal when the statute specifically exempts such transaction under the Securities Act of 1933, Section 4, which has to do with exempted transactions where there had never been a public offering by the petitioner?

4. May a criminal conviction be predicated on evidence where there had been no illegal sale of stock, or illegal transaction, when said items are exempt from registration?

5. Where substantial errors of constitutional magnitude were committed by the court and the court failed to clarify to the jury by proper interpretation, as well as misapplying the interpretation of the Security Act of 1933 as amended, with specific reference to Sections 3, 4 and 5 of the rules and regulations, is Petitioner entitled to a reversal?

STATEMENT

Petitioner was charged and tried on five counts in an indictment filed in the Southern District of New York in violation of 77e(a), 77g(a) and 77x of U.S. Code and sections 1341, 1343 of title 18 of U.S. Code which has to do with the sale of unregistered stock of Belmont Oil Corporation through the use of mails. Count 1 is the usual conspiring count. Counts 2, 12, 17 and 18 deal with the use of mails in the sale of unregistered stock.

Originally there were 18 defendants charged in the indictment prior to the actual trial. All pleaded guilty except your petitioner, Vincent Schwenoha, Nathan Seuss and Louis Shomberg, who was discharged because a mistrial was declared as to him.

After trial, your petitioner, Vincent Schwenoha, was convicted on counts 1, 2, 12, 17 and 18, and sentenced to a term of 3 years on all counts to be served concurrently together with a fine of $500.00 on each count totalling $2500.00. (R.T. 19, 20)*

The indictment charges that Vincent Schwenoha together with other defendants conspired to sell unregistered stock of Belmont Oil Corporation in violation of the Securities Act of 1933. The government, in its opening statement, said, "the government will prove a conspiracy to sell unregistered stock of Belmont Oil Corporation and not a conspiracy to defraud." (R.T. 4)

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* References hereinafter made to the Clerk's transcript will be designated "C.T.", and to the Reporter's transcript as "R.T.".

Belmont Divide Mining Company was organized in the year 1919 under the laws of the state of Nevada. In or about November 1957 the name was amended to read Belmont Oil Corporation. An assessment sale of stock which was originally issued in 1919 was made at a sheriff's sale. Your petitioner purchased a portion of this stock for $3000.00 on September 14, 1956. (R.T. 1113, 1114) (C.T. exh. O)

James Boren purchased the Belmont Oil Corporation, and acquired all the unissued stock which was placed in escrow with a bank, as well as the original issue of the stock of the company made prior to 1919. Your petitioner was permitted to keep his 50,000 shares of this original issue. (R.T. 131, 132). It is this stock alone which became the issue involved in the indictment against the petitioner, and,

the sale of which he made to individuals to acquire needed money for another project.

Mr. Boren held a stockholder's meeting in February 1958 in Houston, Texas. At this meeting he called upon Mr. Crowell, the attorney for Belmont Oil Corporation, who had been a former judge and thoroughly familiar in security matters. Mr. Crowell declared that the said 350,000 original issue of stock did not have to be registered, of which your petitioner owned 50,000 shares. Mr. Boren and all the stockholders relied on this opinion, and, Mr. Crowell placed it in writing for the corporate records. (R.T. 1124) (C.T. A99 Def. Ex. B)

Your petitioner never occupied any position within the management of the corporation. He was a stockholder. He

later sold his stock in order to acquire money for the purpose of marketing a safety device brake for trucks. This sale is contended by the government to be in violation of the Securities Act of 1933. (F.T. 497, 1154) (C.T. Alll--exh. F)

REASONS FOR GRANTING THE WRIT

1. The Statute of Limitations barred prosecution on all counts. The government never established that the petitioner committed an overt act within the statute of limitations. The stipulations agreed to in open court are to be interpreted in a light most favorable to the petitioner. (2 C.A.) (U.S. v. Altanese 123 F. Supp. 732, aff'd. 224 F 2d 879)

The case record reveals that petitioner withdrew from the Belmont Oil Corporation to the knowledge of everyone in March

1959, and, if any conspiracy exists toward others by their admissions, it is of no effect upon the petitioner. (R.T. 1161, 1154 to 1156, 611 and 659)

The period of the statute of limitations is material and relevant as a matter of law wherein this petitioner is involved. The court was required to present this to the jury for their determination of fact, especially in relation to the overt act charged against the petitioner. This is reversible error. No person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found within five years next after such offense shall be committed. (R.T. 1483) (68 Stat. 1145 - 1 Sept. 1954, ch. 214, Sec. 10(a)).

The court failed to give any instructions to the jury as to the defense of the statute of limitations. A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in evidence.. Since this affirmative defense was promptly raised, and was not presented to the jury, this implied a rejection by the court of so important a defense for consideration where evidence had been submitted of the petitioner's withdrawal in March 1959.

The trial judge's charge failed to focus the attention of the jury on whether the individual defendants had knowingly continued any illegal acts, if any were committed, within the five year statute of limitations preceding the indictment. The prosecution in lumping 18 defendants

the sale of which he made to individuals to acquire needed money for another project.

Mr. Boren held a stockholder's meeting in February 1958 in Houston, Texas. At this meeting he called upon Mr. Crowell, the attorney for Belmont Oil Corporation, who had been a former judge and thoroughly familiar in security matters. Mr. Crowell declared that the said 350,000 original issue of stock did not have to be registered, of which your petitioner owned 50,000 shares. Mr. Boren and all the stockholders relied on this opinion, and, Mr. Crowell placed it in writing for the corporate records. (R.T. 1124) (C.T. A99 Def. Ex. B)

Your petitioner never occupied any position within the management of the corporation. He was a stockholder. He

court, the prosecution and the defense-- the deaths of Mr. Crowell, attorney for Belmont Oil Company, Mr. Naismith, the registration agent of the stock and Edward Gallicia, attorney in New York, counsellor for the Cantor brothers, and, Max Hammerling, an extremely material witness who suffered a heart condition. (United States v. Borelli 336 F 2d 376, 388) (2 C.A.) (Chaifetz v. U.S. (1960) 288 F 2d 133)

Sharp issue is taken with the portion of the opinion of Judge Kaufman on page 11, of the Circuit Court of Appeals, Second Circuit, wherein it is contended that, the defense of the statute of limitations in behalf of the petitioner is without merit. The trial judge must be especially careful to charge the jury in its effect, in relation to the facts of the case. Under a

plea of not guilty, the last overt act of the petitioner must be specifically shown, as well as the fact that the petitioner completely disconnected himself with any conspiracy. A jury is entitled to be charged to this effect, especially within the security of the presumption of innocence. This would be prejudicial error requiring reversal. The court denied the motions timely made for the dismissal prior to the court's charge, and, again after the jury's verdict (R.T. 1483). The constitutional rights of the petitioner were materially affected in preventing the jury to determine whether there had been a continuous cooperation with co-conspirators, and, whether the petitioner separated from the conspiracy in March 1959, to the knowledge of all concerned.

Under Federal Criminal Rules, Rule 30, which deals with security involving life and liberty. An appellate court may notice plain and seriously prejudicial error in the trial court's instruction to the jury, even though the error had not been called to the attention of the trial court. (Chapman v. California (Feb. 22, 1967) 176 F 2d, 705) (U.S. v. O'Connor 237 F 2d, 466).

The court should have charged the jury, that any acts prior to July 14, 1959 were not connected, or could not be considered in determining guilt. The jury could have found that the petitioner herein was exonerated. In the case of U.S. v. Borelli, 336 F 2d 376, (2 CA)(1964) states in effect, "that the question of whether there was an affirmative act of withdrawal should have been submitted to the jury,

and, it is reversible error not to do so."

2. The decision of the Court of Appeals, Second Circuit, in the instant case deals with an important question, to wit, the effect of converting a legal act into an illegal act in defiance of the legislative intent in the passage of Section 3(a)(1) of the Act, 15 U.S.C. 77c(a)(1), which exempts from registration "any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public, --- but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days ----"

The contention of the petitioner in that the sale of his personal stock in

opportunity to become part of a conspiracy is insufficient to establish the petitioner's guilt as part of that conspiracy. (18 U.S.C. sec. 500, 641) sec. 321. (Causey v. U.S. - 352 F 2d 203)

Any agreement honest and lawful on its face must be treated as such until it is shown to be otherwise by positive evidence. A penal statute is one that punishes and must be strictly construed in favor of, not against, the person brought into court to answer an alleged inffaction. Over repeated objections, an inordinate mass of irrelevant evidence was presented by the government as to collateral transactions and its alleged background, resulting in a denial of a fair trial. This is especially pronounced where fraud was not alleged or to be proved.

3. There had been other substantial

The petitioner's stock has always been known in the trade as "free stock" and not subject to any impediment of being required to be registered with the Security Exchange Commission. (Sec. 3 - Security Exchange Rule). Sale of such stock is not considered to be a new offering even though it was devaluated to one cent a share. The character of the stock as "original issue" had never changed, and, therefore outside of the statute. This exemption under the Act includes as well brokers' transactions executed upon a customer's order, or any exchange, or, in the open or over the counter market. (Securities Act of 1933, Sec. 4(1)(21) Furthermore, the government never proceeded to develop its case on the theory of fraud, but, merely on the technical violation in selling unregistered stock.

Ordinarily a person cannot be guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. (U.S. v. Crimmins 133 F 2d 271, 272 (2 Cir. 1941)

The Southern District Court of New York treated the petitioner as being involved in a conspiracy to sell unregistered stock, and, treated the overt act No. 25 as including the petitioner. The court never submitted to the jury for its consideration, the fact that the petitioner abandoned, or, had withdrawn from any conspiracy. It is the jury who acts as a check upon the judicial feelings of a judge permitting unsophisticated minds to decide the facts.

The interpretation of the statute is of vital concern especially in explaining

to the jury what stock must be registered; and, permitting the jury to decide the fact, whether or not the petitioner's stock involved in this case is the original issue by the issuer prior to the creation of the Act, and, therefore exempt from registration. Conspiracy may not be inferred from mere association. It is the duty of the trial judge to guard against such a possibility by scrutinizing the evidence as to each of the several defendants before submitting the case to the jury, although the burden of establishing withdrawal from any conspiracy is on the petitioner who asserts it. (U.S. v. Hickey - 360 F 2d 127) (Hayes v. U.S. - 329 F 2d 209)

Evidence merely proving that by association with guilty parties, and, that the petitioner may have had an

opportunity to become part of a conspiracy is insufficient to establish the petitioner's guilt as part of that conspiracy. (18 U.S.C. sec. 500, 641) sec. 321: (Causey v. U.S. - 352 F 2d 203)

Any agreement honest and lawful on its face must be treated as such until it is shown to be otherwise by positive evidence. A penal statute is one that punishes and must be strictly construed in favor of, not against, the person brought into court to answer an alleged infraction. Over repeated objections, an inordinate mass of irrelevant evidence was presented by the government as to collateral transactions and its alleged background, resulting in a denial of a fair trial. This is especially pronounced where fraud was not alleged or to be proved.

3. There had been other substantial

error of constitutional magnitude requiring a reversal of conviction:

(a) There had been inadequate explanation of such a difficult statute by the trial court in relation to the attending facts and circumstances. Evidence that merely cast suspicion on the petitioner is not enought to sustain conviction. (U.S. v. Anderson - 352 F 2d 500)

(b) The trial judge, when reciting the evidence to the jury, eliminated from the jury's consideration the fact that after January 9, 1959 there had been a complete change of ownership and control of Belmont Oil Corporation which served to exempt any sales made by the petitioner from the interdiction of the Securities Act and rendered the sales lawful. (R.T. - 572, 987, 988, 989, 991,

992, 993) (C.T. exh: J, K, L, M.)

(c) The trial court charge to the jury presented a biased contention strongly favorable to the prosecution by failing to apprise the jury of evidence favorable to the petitioner. The court created an atmosphere that the petitioner was presumed to be more knowledgable as to the vagaries of the law involved herein and to be superior to the legal experts or even the court itself. This has all the earmarks of a mistrial.

(d) The court charged the jury that the legal opinion given to the petitioner by the attorney for the Belmont Oil Corporation was incorrect law and that there was no exemption for securities issued prior to 1933. The judge took away from the jury the factual effect of the legal counselling given to the petitioner in relation to the

registration of the stock. This seriously borders upon "wilfullness" in relation to intent to commit a crime. This interpretation inferentially imparts to the jury that they are to find a verdict of guilty because there are no facts to consider in the case.

(5) Max Hammerling is a material and vital witness in this case. Truth is the aim of justice. There is no document in evidence as to the status of Mr. Hammerling except a lawyer's statement. His testimony is necessary to vindicate the petitioner. A deposition would have been of value if it could be acquired. (R.T. - 804, 805, 1009, 1010, 1011, 1012)

CONCLUSIONS

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Samuel Rowe
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Morton Binstock, et al.,

Defendants,

Vincent Schwenoha and Nathan Suess,

Defendants-Appellants.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant Vincent Schwenoha,

Upon consideration thereof, it is

Ordered that said petition

for rehearing be and it hereby is denied.

It is further ordered that the issuance of the mandate be stayed pursuant to Rule 28(c) and that bail be continued pending the filing of a petition for a writ of certiorari.

/s/ LEONARD F. MOORE

/s/ J. JOSEPH SMITH

/s/ IRVING R. KAUFMAN

Circuit Judges

October 26, 1967

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 71--September Term, 1967.
Argued September 25, 1967
Decided September 28, 1967
Docket No. 31240

UNITED STATES OF AMERICA,
Appellee,

-v-

VINCENT SCHWENOHA and NATHAN SUESS,
Appellants.

Before:
MOORE, SMITH and KAUFMAN,
Circuit Judges.

Appeal from Judgments of conviction for violating and conspiring to violate the Securities Act of 1933, 15 U.S.C. §77a, et seq.

Affirmed.

Frederick F. Greenman, Jr., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, Southern District of New York, Robert G. Morvillo, Pierre N. Leval, Assistant United States Attorneys, of counsel), for appellee.

Samuel Rowe, New York, N.Y., for appellants.

KAUFMAN, Circuit Judge:

This appeal reveals a typical stock fraud upon the public which the Securities Act of 1933, 15 U.S.C. §77a, et seq., was designed to prevent. Vincent Schwenoha purchased in 1956 all the outstanding stock of the Belmont Divide Mining Corporation, a paper corporation that had ceased doing business in 1924. He and others devised a plan to sell this worthless stock to the public without registering it with the Securities and Exchange Commission. The corporation's name was changed to Belmont Oil Corporation, certain oil leases of unspecified value were given to the corporation to create the appearance of assets, the stock was split ten for one to create more shares to sell to the public and placed in the names of nominees to conceal the fact of control by a handful of conspirators. Nathan Suess then joined the conspiracy and assisted in finding brokers who would sell the worthless stock to the naive and trusting public. Calling himself the public relations man for Belmont Oil, Suess met with co-defendants Edward Cantor and Michael Canter at the office of their brokerage firm, Peerless-New York, Inc., and arranged for them to maintain a market for Belmont stock and also to sell the stock to the public. These and other brokers sold Belmont to the public for about one dollar per share by typical boiler-room methods. Eight co-defendants pleaded guilty;[1] appellants were convicted by a jury of conspiracy and also found guilty of causing unregistered Belmont stock to be mailed on July 14,

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[1] A mistrial was declared as to one co-defendant; five corporate co-defendants were tried separately.

August 6, and October 2, 1959 for the purposes of sale and delivery after sale.

Appellants' main contention is that the stock was exempt from the registration requirements of the Securities Act because it was issued originally in 1919, long before the passage of the Act in 1933. They rely on section 3(a)(1) of the Act, 15 U.S.C. §77c(a)(1), which exempts from registration "any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public,..." But, their dependence on this argument ignores the language of the remaining portion of that sentence, which states, "but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days..." It is undisputed that the sale of Belmont stock to the public was a new offering, and there is little question that appellants were issuers or underwriters. See 15 U.S.C. §77(b)(11); Securities and Exchange Commission v. Culpepper, 270 F.2d 241 (2d Cir. 1959). The evidence is overwhelming that they and others acted together to control Belmont Oil thoroughly and completely, and that they knew the stock they sold to various brokers would be resold to the public; in truth, that was their ultimate goal.

Morecver, appellants urge that Judge Palmieri committed reversible error by not charging the jury with respect to the applicable five-year statute of limitations. This claim is wholly without merit because it is undisputed that the mailings for which appellants were convicted occurred

for rehearing be and it hereby is denied.

It is further ordered that the issuance of the mandate be stayed pursuant to Rule 28(c) and that bail be continued pending the filing of a petition for a writ of certiorari.

/s/ LEONARD F. MOORE

/s/ J. JOSEPH SMITH

/s/ IRVING R. KAUFMAN

Circuit Judges

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Before:

MOORE, SMITH and KAUFMAN,
Circuit Judges.

Appeal from Judgments of conviction for violating and conspiring to violate the Securities Act of 1933, 15 U.S.C. §77a, et seq.

Affirmed.

Frederick F. Greenman, Jr., Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, Southern District of New York, Robert G. Morvillo, Pierre N. Leval, Assistant United States Attorneys, of counsel), for appellee.

Samuel Rowe, New York, N.Y., for appellants.

between July 14 and October 2, 1959. Accordingly, the acts occurred within five years of the filing of the indictment on July 14, 1964. Burnet v. Willingham Loan & Trust Co., 282 U.S. 437 (1931). Appellants call to our attention, however, that they individually did not commit acts within the statutory period. In this connection, Schwenoha urges that he testified that he withdrew from the conspiracy in March 1959. But as we noted in United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), cert. denied sub nom. Cinquegrano v. United States, 379 U.S. 960 (1965), "mere cessation of activity is not enough to start the running of the statute; there must be affirmative action, either the making of a clean breast to the authorities,...or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." The record is clear that the alleged withdrawal does not come close to meeting this test; in any event, no exception was taken to the failure to charge on the issue of withdrawal. See F.R. Crim. P. 30; United States v. Kahaner, 317 F.2d 459 (2d Cir.), cert. denied, 375 U.S. 836 (1963). The evidence of withdrawal being insufficient to raise a question for the jury, a fortiori appellants' motion for acquittal on this ground was properly denied.

We have examined appellants' other claims and find them to be without merit. The judgment is affirmed.